IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

SANDRA NORMAN
Plaintiff

V. NO. 4:97CV48-B-B

LIPSCOMB OIL COMPANY, INC.
and LEON McNEIL
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion for summary judgment.[1] The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The defendant owns several convenience store/gas stations in the Greenville, Mississippi, area, including a store designated as Citgo #20. At all times relevant to this action, Leon McNeil was the manager of Citgo #20. On September 19, 1995, the plaintiff went to the Citgo #20 to be interviewed for a job by McNeil. At the conclusion of the interview, McNeil made sexually inappropriate comments concerning the plaintiff's breasts, and then proceeded to touch the plaintiff on her breasts and buttocks.

Despite the inappropriate sexual conduct of McNeil, the plaintiff accepted the defendant's job offer and reported to work the day after the interview. The plaintiff did not mention the sexual harassment until September 28, 1995, at which time she wrote a letter to Karen Vest,

[1] Lipscomb Oil Company is apparently the only defendant to have been served with the complaint, and therefore, is the only defendant actively participating in the litigation. Thus, when the court refers to "the defendant" it is referring specifically to Lipscomb Oil Company.

McNeil's supervisor, complaining of McNeil's actions on the day of the interview. The plaintiff does not contend that McNeil harassed her at any time after the date of the interview. By letter dated October 4, 1995, the defendant offered to transfer the plaintiff to another store located closer to the plaintiff's residence. The plaintiff accepted the transfer. At her new store, the plaintiff maintained the same position and rate of pay for which she was originally hired.

Immediately upon receipt of the plaintiff's letter, the defendant hired a local attorney to conduct an independent investigation of the plaintiff's allegations of sexual misconduct. The results were inconclusive, however, as there were no witnesses to the interview other than McNeil and the plaintiff.

On October 27, 1995, the plaintiff took a medical leave of absence that was unrelated to her job. When she was released to return to work on or about November 28, 1995, the defendant offered the plaintiff one day a week, until such time as she could be worked back into the schedule. The plaintiff refused to accept the defendant's offer of one day a week, and did not return to work.

On February 14, 1996, the plaintiff filed a charge of discrimination with the EEOC, alleging sexual harassment by McNeil during the interview on September 19, 1995. On November 25, 1996, the plaintiff filed suit for sexual harassment under Title VII of the Civil Rights Act of 1964, and for intentional infliction of emotional distress, assault and battery, and other unnamed state law claims.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that

there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

A. Sexual Harassment

There are two scenarios by which a plaintiff may assert a cause of action for sexual harassment under Title VII, one of which is a hostile work environment. To establish a prima facie case of hostile work environment sexual harassment, a plaintiff must present: (1) evidence of sexual harassment sufficiently pervasive so as to affect the plaintiff's employment; and (2) evidence that the employer knew or should have known of the sexual harassment and failed to take prompt remedial action. Nash v. Electrospace Sys., Inc., 9 F.3d 401, 403-404 (5th Cir. 1993); Jones v. Flagship Int'l, 793 F.2d 714, 724 (5th Cir. 1986), cert. denied, 479 U.S. 1065, 93 L. Ed. 2d 1001 (1987). Assuming that the plaintiff's allegations of sexual harassment are true, the plaintiff's cause of action for hostile work environment sexual harassment must fail because

the uncontroverted evidence shows that the defendant took prompt remedial action.

The undisputed facts submitted by the defendant show that upon receiving a complaint of sexual harassment from the plaintiff, the defendant immediately offered to transfer the plaintiff to another store so that she would no longer be working under the supervision of McNeil. The plaintiff accepted the defendant's offer. To be sufficient, prompt remedial action must be reasonably calculated to end the alleged harassment. Waltman v. International Paper Co., 875 F.2d 468, 479 (5th Cir. 1989); see also Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 511 U.S. 244, 128 L. Ed. 2d 229 (1994). The action taken by Lipscomb Oil Company is similar to that taken by the employer in Nash. After Nash complained of sexual harassment, the company began an immediate investigation. Despite finding no evidence to corroborate Nash's complaint, the company transferred Nash to another department with no loss of pay or benefits. The Fifth Circuit found that the investigation and transfer, taken within one week of Nash's complaint, met the definition of prompt remedial action so as to insulate the employer from liability. Nash, 9 F.3d at 404. In the present action, the court finds that the defendant, by transferring the plaintiff to another store and immediately instigating an investigation, took prompt remedial action, reasonably calculated to end the sexual harassment. Therefore, the plaintiff cannot maintain an action under Title VII for hostile work environment sexual harassment.

The other scenario by which a plaintiff may assert sexual harassment under Title VII is known as quid pro quo. To assert a claim of quid pro quo sexual harassment, the plaintiff must offer evidence that her supervisor or another superior requested sex as an express or implied condition to receipt of a job benefit. Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995); Jones, 793 F.2d at 722. In the present action, the uncontroverted facts fail to

present any evidence of quid pro quo sexual harassment. The plaintiff admits that the job offer was made and accepted before any of the alleged harassment. She further concedes that she was employed by Lipscomb Oil Company without further incident for the remainder of her employment. The plaintiff has failed to provide any evidence that sexual favors were required as a quid pro quo for job benefits. Therefore, the court finds as a matter of law that the plaintiff's cause of action for quid pro quo sexual harassment is without merit and should be dismissed.

B. Retaliation

The plaintiff further asserts that she was constructively discharged from employment in retaliation for asserting her rights under Title VII by complaining of sexual harassment. Upon her return from medical leave, the plaintiff was offered one day a week until such time as she could be worked back into the schedule. The plaintiff asserts that the defendant always needed to hire additional employees at one of their many stores in the Greenville area, and thus could have transferred the plaintiff to another location. The plaintiff also contends that other employees at the plaintiff's store were working significant amounts of overtime, and therefore, there should have been enough hours available to schedule her for a full forty-hour week.

The plaintiff filed her charge of discrimination with the EEOC on February 14, 1996. The charge does not assert any claim for constructive discharge or retaliation, nor does it recite any allegations of wrongdoing outside of the acts of McNeil during the interview on September 19, 1995. The filing of an administrative complaint is a jurisdictional prerequisite to bringing suit under Title VII. Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980), cert. denied, 450 U.S. 997, 68 L. Ed. 2d 198 (1981). Since the only administrative charge filed by the plaintiff fails to assert a claim for retaliation, the plaintiff's claim of retaliation must be dismissed.

The plaintiff asserts that she need not file a separate charge of retaliation with the EEOC

before including a retaliation claim in her complaint. The plaintiff would be correct if the retaliatory act had occurred after the filing of the EEOC charge. See Gupta v. East Tex. State University, 654 F.2d 411, 413-414 (5th Cir. Unit A Aug. 1981). However, where the retaliation occurred prior to the filing of the EEOC charge and the claim for retaliation is not reasonably related to the underlying discrimination claim, the retaliation claim must be included in the EEOC charge or it will be procedurally barred. See Ang v. Procter & Gamble Co., 932 F.2d 540, 546-547 (6th Cir. 1991) ("retaliatory conduct occurring prior to the filing of the EEOC complaint is distinguishable from conduct occurring afterwards as no unnecessary double filing is required by demanding that plaintiffs allege retaliation in the original complaint"); Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 544-545 (7th Cir. 1988), cert. denied, 491 U.S. 907, 105 L. Ed. 2d 699 (1989) (Gupta and other similar cases are distinguishable from the present case where the alleged retaliatory acts occurred before the charge of discrimination was filed and the employer was not given clear notice that retaliation was at issue). As noted by the Fifth Circuit, "the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Ray, 626 F.2d at 443 (citing Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

In the present case, the plaintiff's EEOC charge was limited to allegations of misconduct during the interview on September 19, 1995. The plaintiff's employment ended over two months later, while working at a different store other than the one in which the alleged discrimination took place. McNeil was no longer the plaintiff's supervisor and had had no contact with the plaintiff since she was transferred to the new location. Further, the plaintiff was not discharged but rather quit over a dispute in her working hours. Under the circumstances, the court finds that no investigation arising from the plaintiff's EEOC charge could reasonably be expected to

include an investigation into the termination of the plaintiff's employment. Therefore, since the plaintiff's claim for retaliation cannot be reasonably expected to grow out of her charge of discrimination and since the EEOC charge was not filed until after the plaintiff's alleged constructive discharge, the court finds that the plaintiff's claim for retaliation should be dismissed.

In the alternative, even if the plaintiff's claim for retaliation was not procedurally barred, the defendant would be entitled to summary judgment since the plaintiff has failed to produce any evidence of a causal connection between her complaint of sexual harassment and her subsequent "constructive discharge." To present a prima facie case of retaliation under Title VII, the plaintiff must offer evidence that: (1) she engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment action. Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 193 (5th Cir. 1991), cert. denied, 502 U.S. 1072, 117 L. Ed. 2d 133 (1992); Jones v. Flagship Int'l, 793 F.2d at 724. The plaintiff's only evidence that she was constructively discharged in violation of Title VII is her own subjective belief that her hours were limited in retaliation for asserting a claim of sexual harassment. A plaintiff's own subjective belief, however genuine, is insufficient to support a cause of action for discrimination under Title VII. Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215, 81 L. Ed. 2d 364 (1984).

C. State Law Claims

The defendant moves for summary judgment on the grounds that the statute of limitations expired on the plaintiff's state law claims prior to the commencement of this action. See Miss. Code Ann. § 15-1-35 (1995) (one-year statute of limitation for assault and battery); Guthrie v.

J.C. Penney Co., 803 F.2d 202, 210-211 (5th Cir. 1986) (one-year statute of limitation for intentional infliction of emotional distress). In her response, the plaintiff concedes summary judgment as to her claims arising under state law.

D. Other Motions

The plaintiff has filed a motion to amend plaintiff's response to defendant's motion for summary judgment as well as a separate response to defendant's rebuttal memoranda (i.e. a surrebuttal). The defendant has filed a motion to strike the plaintiff's response to defendant's rebuttal memoranda. Pursuant to Rule 8 of the Uniform Local Rules, motion practice before this court allows for the filing of a motion, reply and rebuttal. Thus, the plaintiff's surrebuttal is not permitted, and the defendant's motion to strike should be granted. However, the court will grant the plaintiff's motion for leave to amend its response. The plaintiff's response is therefore deemed to include the arguments presented in the plaintiff's motion for leave to amend.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion for summary judgment and motion to strike should be granted and the plaintiff's motion to amend response should be granted. An order will issue accordingly.

THIS, the ____ day of March, 1998.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE